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IN THE

Supreme Court of the United States

October Term, 1963
No. 584

ROGER ARNEBERGH,

Petitioner,

vs.

JACOB ZEITLIN, and PAUL FERGUSON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Brief Amici Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, and California Citizens for Decent Literature, Inc., a California Corporation, in Support of Petitioner.

CHARLES H. KEATING, JR.,
3701 Carew Tower,
Cincinnati 2, Ohio,

JAMES J. CLANCY,
9055 La Tuna Canyon Road,
Sun Valley, California,
Counsel for Amici Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Brief Amici Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, and California Citizens for Decent Literature, Inc., a California Corporation, in Support of Petitioner.

This brief is filed pursuant to Rule 42(1) of this Court.

Interest of Amici Curiae.

Citizens for Decent Literature, Inc., an Ohio corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent, and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. California Citizens for Decent Literature, Inc., a California cor-

poration, operates as an affiliate of the national organization and is similarly dedicated.

The formulation of both organizations grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature.

For convenience, *amici curiae* are also hereinafter referred to by the single, short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interests; that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overthrow of this "balancing of interests" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its recent national convention in Chicago during October of 1963, CDL adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the courtroom in support of the People's case. Such action made possible, for the first time, the filing of the brief submitted herewith.

Summary of Argument.

The Supreme Court of the State of California has decided three federal questions of substance not theretofore determined by this Court. Amici submit the following as the proper rules of law to be applied:

(1) The People have a federal constitutional right to a jury determination on the issue of "obscenity."

(2) The test to be applied by a reviewing court (constitutional) in a case where the People have not waived a trial by jury on the "obscenity" issue is "Whether reasonable minds might differ that the material is obscene."

(3) Tropic of Cancer, as a matter of law, is without the area of protected speech and press as that line is drawn in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957).

Said Court has also decided a federal question of substance in a way not in accord with the applicable decisions of this Court. Amici submit the following as the correct statement of the law:

(1) Freedom of speech and the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and as construed in *Roth v. United States* and *Alberts v. California* (*supra*), and other decisions of this Court do not limit the proscription of state obscenity laws to the suppression of "hard-core" pornography only.

ARGUMENT.

I.

The People Have a Federal Constitutional Right to a Jury Determination on the Issue of "Obscenity."

Although the matter in the court below is a civil action,[1] the decision rendered therein[2] collaterally attacks the criminal prosecution, *Bradley Reed Smith v. People of the State of California* (certiorari granted by this Court on April 29, 1963, October Term, No. 72), then in progress *in the same community* and involving the same book, Tropic of Cancer, and preempted the People of their constitutional right (both federal and state) to a jury trial therein.[4] It is inescapable that the decision is a direct attack on the Bradley Reed Smith *criminal* prosecution and a reversal of that jury's

[1] A complaint for declaratory relief.

[2] That the declaratory relief action was proper, that Tropic of Cancer was not violative of Penal Code Section 311.2, and enjoining the people from prosecuting persons for the sale of Tropic of Cancer.

[3] The People charged Bradley Reed Smith with a misdemeanor violation of California Penal Code Section 311.2 in that he did on or about October 9, 1961, in the City and *County of Los Angeles* knowingly exhibit and distribute "obscene material, to-wit: 'Tropic of Cancer,' by Henry Miller. He was duly arraigned and entered a plea of not guilty. The trial commenced on January 15, 1962, and after 27 trial days, the jury returned a verdict of guilty. (Resp. Br. filed in this Court in *Bradley Reed Smith v. Calif.*, pp. 2, 3.) Respondents commenced this action against the City Attorney of Los Angeles in the Superior Court of the *same* county (County of Los Angeles), *after* the Smith misdemeanor prosecution was filed and before the jury rendered its verdict.

[4] The People refused to join in the defendant's motion to waive trial by jury in the *Bradley Reed Smith* case. The People in California have a constitutional right to a jury trial in criminal cases. See Article I, Section 7 of the California Constitution and Judge Huls' opinion in the *Bradley Reed Smith* case. (Resp. Br. *Bradley Reed Smith v. Calif.*, Appendix A, p. 6.)

finding that Tropic of Cancer is obscene. Nor did the people waive their right to a jury trial in the *civil* action.[5] The petition for certiorari should be viewed in this light.

That the parties have a federal constitutional right to a jury trial on the issue of "obscenity" in a *criminal* obscenity case may have been decided by this Court in the *Roth* case.[6]

Justice Brennan made it clear in *Kingsley Book, Inc. v. Brown*, 360 U. S. 684, 1 L. Ed. 2d 1469, 1478, that he considered the right to a jury trial was a constitutional guarantee in *civil* cases also.[7]

Whether a book seller has a constitutional right to a jury trial on the issue of "obscenity" in *civil* actions is a question raised in an appeal now on file in this Court. (See Jurisdictional Statement, *A quantity of copies of Books, Harold Thompson and Robert Thompson, d/b/a*

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[5]Judge Rhode in the trial court sustained the *People's general demurrer* to the complaint for declaratory relief as did Justice Lillie, writing the opinion for a unanimous court in the District Court of Appeal, 211 A. C. A. 31, 27 Cal. Rptr. 320 at page 325.)

[6]Justice Brennan, speaking for the majority, cited with approval a jury instruction given in the *Roth* prosecution in the trial court, at page 1510, to the effect that "In this case, ladies and gentlemen of the jury, you and you alone are the *exclusive* judges of what the common conscience of the community is." (Our emphasis.) In the companion criminal case of *Alberts v. California*, both the People and the defendant had waived their right to trial by jury.

[7]In the *Kingsley* case, this Court in a five-to-four decision upheld a civil injunction brought by the State of New York and a finding by the trial court that the book "Nights of Horror" was obscene. Under New York equity practice, discretionary jury trials are provided for and advisory verdicts are to be followed or rejected by the trial judge as he deems proper. Justice Brennan based his dissent on the failure of the New York practice to require a jury trial, *although that issue was not before the court* (the defendant not having raised the issue).

P.K. News Service v. State of Kansas, in the Supreme Court of the United States, October Term, 1963, No. 449.)[8] Are the rights of the community to speak through a jury on "shame" any less than the rights of a book seller to the same determination on "candor?" (See the arguments *for* a jury trial in the Kansas Case Jurisdictional Statement, pp. 19-27.)

In the *Kingsley* case, Justice Brennan pointed out that the constitutional standard for obscenity, *by definition*, calls for a jury trial.[9] The California Supreme Court below thought otherwise.[10]

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[8]Kansas statutes provided for an *in rem* civil action against obscene publications. The Kansas Supreme Court in 379 P. 2d 254, affirmed a finding of the trial court that certain books carrying the inscription, "This is an original Nightstand Book," were obscene and a ruling that a jury trial was not required in a proceeding *in rem* of a civil nature. Is Counsel Stanley Fleishman positioned on the "Horns of a Dilemma?" Compare his arguments in the Kansas case with his arguments in *Bradley Reed Smith v. Calif. (supra)*. See also the "Motion to Dismiss" of the Kansas Attorney General at p. 14.

[9]At page 1478, "in *Alberts' v. California*, and *Roth v. United States*, decided today, 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. . . .

"The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, *by its definition*, calls for an appraisal of material according to the average person's *application* of contemporary community standards. . . ." (Our emphasis.).

[10]See opinion of California Supreme Court appearing at page 12 of Petition for Writ of Certiorari:

> "Finally, we do not believe that the definition of 'obscene' material as that which 'to the *average person* . . . predominant appeal . . . is to prurient interest. . . .' (Emphasis added) indicates that the ultimate determination of that question is always for the jury. These words fix a *standard* which is to be applied to the material; they

Historically the "constitutional standard" expressed by Justice Brennan in *Roth* had its genesis in an opinion written by Judge Learned Hand, *United States v. Kennerley*, 209 Fed. 119 (S. D. N. Y. 1913), often called the "architect" and "father" of modern obscenity law.[11] In that decision, Judge Learned Hand disapproved of the rule in *Regina v. Hicklin*, L. R. 3 Q. B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question.[12] Kennerley's general demurrer to a federal in-

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do not designate the body which is to apply the standard. The . . . language does not inherently predicate a question for the jury; it merely frames a definition. . . ." Compare this with Judge Learned Hand's opinion at note 14.

[11]Twenty-one years later in *United States v. One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705 (1934), in a two-to-one decision in the Circuit Court of Appeals, Second Circuit, Judge Learned Hand joined with Judge Augustus Hand to establish "dominant effect" as one of the measuring sticks for obscenity in a case of major importance. The decisions in between *Kennerley* (1913) and *Roth* (1959) which used the "average man" and "predominant appeal" test cite Judge Learned Hand's early decision in *Kennerley*.

[12]At page 121.

". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. . . .

". . . Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctly from life and common speech." (Our emphasis.)

dictment for placing an obscene book in the mails raised the very legal question which was presented to the court below,[13] namely, what action may a court constitutionally take where no evidence of community standards is before it and where the People have neither had the opportunity to speak on the community standards nor indicated an intent to waive such right. Judge Hand, in overruling the demurrer and requiring Kennerley to stand trial, ruled that the "obscenity" issue was for the jury to decide.[14]

Judge Learned Hand, speaking for the Circuit Court of Appeal in *United States v. Levine* (1936), 83 F. 2d 156, 157, in a criminal prosecution for mailing obscene circulars, called the verdict on "obscenity" a "small bit of legislation *ad hoc*, like the standard of care" which the court imposes upon a jury as a "duty."[15] He

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[13]The book was made a part of the record by a Bill of Particulars and by stipulation. Kennerley's demurrer raised the question *before* the actual criminal trial as to whether the book was obscene.

[14]At page 120.

> "Whatever be the rule in England, in this country the *jury* must determine under instructions whether the book is obscene. The court's *only power* is to decide whether the book is so clearly innocent that the *jury* should not pass upon it at all. . . ." (Our emphasis.)

[15]The *Levine* case was cited in *Roth* at footnote 26 as consistent with the obscenity law expressed therein. Learned Hand said in *Levine* at page 157.

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury (Rosen v. United States, supra*, 161 U. S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really *a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

viewed the court's usurpation of this inherent right of the People as an evil. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not: . . . ."[16] Judge Learned Hand gave insight to his decisions, which restricted the role played by the courts in measuring what is obscene. "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disasterous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."[17]

While by the great weight of authority, due process in a constitutional sense (state and federal), does not require a trial by jury, the very nature of "obscenity" seems to demand it as an exception.[18]

In our system of justice the importance of a jury trial is derived from the basic fact that, in questions of fact, the people themselves are in a real sense the court of last resort. "The institution of the jury . . . places the real direction of society in the hands of the governed, or a portion of the governed, and not in that

[16]Hand, the Bill of Rights, Harvard University Press (1958), at page 73.

[17]*Id.* at p. 72.

[18]Obscenity being regarded as "ad hoc legislation."

of the government. . . . All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury."[19]

At the inception of our Federal Constitution, obscenity law was sufficiently developed for it to be said that such utterances were outside the protection intended for free speech and press.[20] If, then, the waivering line between "free speech" and "obscenity" in any community at any given interval in our history is to be drawn by the measure of "candor" and "shame," it would seem that reason and precedent would require that the people themselves should draw it, in a jury trial.

II.

The Determination of Obscenity Is Primarily an Issue of Fact. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Might Differ That the Material Is Obscene."

The constitutional inquiry should look only to the "reasonableness" of the factual determination, *i.e.*, "whether reasonable minds might differ that the material is obscene." Historically, was not the Seventh Amendment to the Federal Constitution adopted to preclude a Federal Court from re-examining facts which are tried by a jury in a state court?[21]

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[19] 1 De Tocqueville, Democracy in America 282.

[20] *Roth* decision, 354 U. S. at 483.

[21] "It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law, tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state. *Chicago, B. & Q. R. Co. v. City of Chicago*," 166 U. S. 226, 240.

The lower court's determination that the issue of obscenity (Tropic of Cancer) is a matter of law for the court, mutilates the *Roth* decision and its significance. The pre-Roth precedence, and the *Roth* test by its very definition, pose a factual (jury) question.[22]

The vice in the lower court's opinion is that the California community may not now or in the future raise its standards above that to which it has been riveted by the California Supreme Court. Whereas the *Roth* decision contemplates a rule of proscription which is dependent upon present day standards,[23] nowhere in the court's decision below is there reference to this norm. For the rich and cherished pluralism in the American heritage, the court seems bent on substituting a monolith fashioned by Henry Miller and the "few".[24] Approval of such a "review" by this Court would effectively nullify the *Roth* test and the nation's obscenity laws.[25]

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[22] See text accompanying notes 9, 12 and 14. Compare *McCauley v. Tropic of Cancer*, 129 N. W. 2d 545, where, in reviewing a civil action in the nature of a declaratory judgment tried to a court, the majority opinion indicates in dictum that under the *Roth* decision the determination of a jury, within some limits, may be final.

[23] Judge Hand in *Kennerley* called it "the *present* critical point in the compromise between candor and shame at which the community *may have arrived here and now*."

[24] "To change standards of morals is the task of school and church; the task of the judge is to record the tides of public opinion, not to emulate King Canute in an effort to turn back the tide. My duty is to act as observer and recorder, not as regulator." *People v. Miller*, 279 N. Y. Supp. 583.

[25] This is rule by "Platonic Guardians." See text accompanying note 16.

> "Almost by definition, a man who is qualified to sit on the Supreme Court is not an average person. Not only by his formal training and experience is he separated from the average citizen in his mental and emotional maturity, but by long tradition and the time-demanding nature of his

By equating (we contend erroneously)[28] the *Roth* test to so-called "hard-core" pornography, the lower court in applying Penal Code Section 311.2 has arrived at an expanded rule of constitutional "review" which has no support in pre-Roth case law and little, if any, in the opinions of this modern court. Whether the court's "review" takes place before trial of the issue in a declaratory judgment civil action (as this case *would be* had not the criminal prosecution of Bradley Reed Smith been in progress), or in the "review" of a jury conviction after a criminal obscenity prosecution (as this case is, in reality), the scope of "review" should be the same; *i.e.* "whether reasonable minds might differ that the material is obscene."

Pre-Roth case law provides absolutely no support for the lower court's interpretation of expanded review. See here a host of cases to the contrary appearing in the extensive annotation following *United States v. Limehouse*, 285 U. S. 426 (decided April 11, 1932), entitled "Respective Functions of Court and Jury in Determining Criminality vel non of Matter." In *Ken-*

office he is removed from daily contact with a cross-section of average American communities."
Censorship: Government and Obscenity, by Terrence J. Murphy. There is a wide chasm between the court below and the standards of seven juries which have tried "Tropic of Cancer." See text following note 42.

[28]The *Roth* test is not limited to "hard-core" pornography. See Argument IV *infra*. The California Supreme Court does not claim that the statutory definition of "obscene matter" of Penal Code Section 311 includes any less material than *Roth*. "This language, indeed, *is* the language by Roth. . . ." (Our emphasis.) (Opinion, Petition for Writ of Certiorari, at p. 24.) This is not the view of Justice Fuld in *People v. Richmond County News*, 175 N. E. 2d 681 (concurred in by Justice Van Voorhis only) where he expresses the view that New York's statute, *independent of Roth*, excludes only "hard-core" material.

nerley (*supra*) Judge Hand said, "The court's *only power* is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States v. Clark* (D.C.), 38 Fed. 500; *United States v. Smith* (D.C.), 45 Fed. 478. The same question arises as would arise upon motion to direct a verdict at the close of the case. . . . The question here is, therefore, whether the jury might find the book obscene under proper instructions."[27] (Our emphasis.)

Did the majority in *Roth-Alberts* exercise a silent review of the material? Although legal writers and the court below claim to the contrary, pointing to the statement in the majority opinion at footnote 8 that "no issue is presented in either case concerning the obscenity of the material involved", the trustworthiness of this evaluation is not so evident.[28] It is difficult to imagine that the *Roth-Alberts* majority would shut their eyes to the subject matter therein concerned with, if such were not in their opinion factually outside the area of free speech and press.[29] Certainly Justices Harlan and Warren found the subject matter to be an issue and considered its nature in their opinion.[30]

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[27]200 Fed. Rptr. 119, 120.

[28]See Supreme Court Rule 10(2)(c), 28 U.S.C.A., which reads, "The statement (jurisdictional) of a question presented will be deemed to include *every subsidiary question fairly comprised therein*." The jurisdictional statement in *Alberts* challenged the California statute "as construed and *applied*." In his principal brief Alberts did contend the matter in the case was not "obscene." 45 Minn. L. R. 525.

[29]Do members of this Court "slide over" such important constitutional judgments where even slightly raised? See the opinion of Justice Brennan in *Manual Enterprises v. Day*, 8 L. Ed. 2d 639, at footnotes 4, 5; also in *Kingsley Book, Inc. v. Brown*, 1 L. Ed. 2d 1469, 1477.

[30]It might be inferred from Justice Harlan's statement that he regarded the majority as refusing to review the facts.

> "I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a

Another view which is more respectful of the Court's guardianship of First Amendment rights is that the remaining five judges of the majority did first look at the material to make certain that "reasonable minds might differ that the material was obscene" and then, observing that the claim was not substantial, rendered their decision as though the issue were not raised; possibly for one of two reasons, so as not to place their imprimatur on the standards decided by those cases, or in deference to the fact finding function of the federal jury and state tribunal involved. If this is so, then the "hard-core" contrivance[31] had no basis at the very beginning, for those who have evaluated the material, seemed to be in agreement that the material was not "hard-core". In this light the so-called expanded constitutional review in the obscenity area is a "myth".

Justice Brennan, author of the majority opinion in *Roth* stated his view very clearly in *Kingsley Book, Inc. v. Brown*, 1 L. Ed. 2d 1469, that in reviewing the subject matter, the Court merely satisfied itself a jury question was present, *i.e.* that "reasonable men may differ whether the material is obscene".[32]

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jury or a judge, has labeled the question matter as 'obscene' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."

[31]See Argument IV.

[32]This seems to be the same test applied by Judge Learned Hand. See note 14. Justice Harlan alone of this present Court has voiced an inclination to learn beyond this. See Justice Stewart's opinion in *Volanski v. United States*, 246 F. 2d 842, 845. Even Justice Black in *Kingsley v. Regents of University of New York*, 360 U. S. 684, 689, voiced the opinion that if censorship was to be the rule, the United States Supreme Court is about the most inappropriate Supreme Board of Censors that could be found. . . ."

The lower court's support comes primarily from Justice Harlan's separate opinion in *Roth-Alberts* wherein he speaks of a "constitutional judgment of the most sensitive and delicate kind." Yet Justice Harlan's inclination to "review," provides weak support (because of his differing approaches to state and federal cases)[33] where the subject matter is Tropic of Cancer, called by the New York Court of Appeal "hard-core" pornography, and where the review involves a state case.

The court below cites the American Law Institute, Model Penal Code, tentative draft No. 6, Section 207.10 (1957) and its successor, Section 251.4(4) of the proposed official draft of the Model Penal Code (1962), as secondary support for the wide "review" exercised by the court. We submit that a historical review of the Model Penal Code development points to the contrary.

The majority of this Court approved the definition of "obscenity" which appeared in the 1957 draft[34] as being the equivalent of the definition given the jury in the *Roth* case, the Court approved definition in the *Alberts* case, the definition appearing in case law and Justice Brennan's Supreme Court Standard.[35] It is significant that among the reporter's notes to the 1957

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[33]Justice Harlan views the proscription of "hard-core" pornography to apply only to *federal* cases. *Roth v. United States (supra)*, at page 1517. Since Penal Code Section 311.2 codifies the *Roth* rule (see note 26) "hard-core" material is not *his* reference line for "review" in state cases.

[34]Section 207.10(2).

[35]1 L. Ed. 2d 1508, footnote 20.

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute, Model Penal Code, Section 207.10(2) (Tentative Draft No. 6, 1957)."

draft the following comment appears on the American Law Institute definition of obscenity:

> "13. *Obscenity As Fact or Law; Role of Court.* Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty. *Any tendency to stray from this line has been in the direction of authorizing the court, where there is no dispute as to the content of the material, to instruct the jury that it is obscene as a matter of law.* . . . Under our definition of obscenity a court could not instruct that a given writing is obscene as a matter of law, since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression. Jury trial in this field has the merit of requiring unanimous condemnation by this sample of general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters. On the other hand, it has been suggested that a doubtful juror may hesitate to find something is not obscene lest he be thought perverse or licentious. In addition *it has been suggested that the issue of obscenity ought not to be trusted to a jury with the same breath of discretion as; for example, the issue of negligence*, because there is much greater

> agreement among ordinary people as to the care expected of a reasonable man than there is on the social, moral, and psychological problems involved in obscenity. Thus juries would be more likely to apply consistent standards in negligence cases than in obscenity prosecutions, where each jury must function as a 'tiny, autonomous legislature.'" (Emphasis ours.)

It was this condition which the drafters were trying to change when they drew up Section 207.10(3) of the 1957 draft. This proposal, however, was *rejected* by the Council of the American Law Institute.[36]

As reason for their proposal, the comment stated: "Bracketed Subsection (3), which was rejected by a narrow margin of votes in the Council of the Institute, would change prevailing law by giving judges a somewhat larger responsibility in deciding what is obscene, in order to meet criticisms relating to the operation of

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[36] See page 48 of the 1957 draft. The overwhelming body of authority is contrary to the position which the drafters were seeking to establish. (See text accompanying note 27.) It is reasonable to assume that the "silent revolution" against the existing standards in ruling case law, existed in that forum also. The same "rebels" were speaking. Justice Fuld of the New York Court of Appeals, who has played such a major role in this area (see note 26), was a member of the American Law Institute, Criminal Law Advisory Committee, as was also the late Judge Curtis Bok of the Pennsylvania Supreme Court. Judge Bok's mother was a member of the board of directors of the Curtis Publishing Co. (which owned 42½% of Bantam Books, Inc. stock) and the daughter of its founder. Judge Bok's brother was vice-president and director of the Curtis Publishing Co. The House of Representatives Report of the Select Committee on Current Pornographic Materials, Dec. 1952, comments at p. 7:

> "It is . . . reasonably possible that having been associated so closely with the publishing business that he became inherently imbued with a liberal conception of the tradition founded upon the constitutional provision guaranteeing the freedom of the press."

juries in this field, and to assure greater consistency on a statewide basis in application of the obscenity law."[37] The operation of juries in this area has not been criticized in ruling case law;[38] nor is consistency in jury verdicts essential.[39] A position contrary to the American Law Institute proposal was taken by the majority of this Court in *Roth* at footnote 30. "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Compare *Dunlop v. United States*, 165 U. S. 486, 499, 500, 41 L. Ed. 799, 803, 17 S. Ct. 375."

The successor to the lengthy pronouncement in Subsection (3) of Section 207.10 of the 1957 draft (rejected by the Council of the American Law Institute) now appears in a much diluted and revised form in Section 251.4(4) of the 1962 proposed official draft of the Model Penal Code. It is a simple statement, "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene".[40] This dif-

[37] At page 48.

[38] We except from this statement the vociferous dissents of the absolutists, notably the late Judge Frank in the Lower Federal Court in *United States v. Roth*, 237 F. 2d 796, 822 (2d Circuit 1956), certiorari granted, 352 U. S. 964 (1957), and certain members of this Court.

[39] Our standards are mellowed in the progressive developments which flow from such multifarious determinations. These jury determinations are the test tubes in the development of our nation.

[40] This statement was only a small part of Section 207.10(3) as proposed. Section 207.10(3) was rejected in its entirety.

fers so radically from its corresponding statement in the 1957 draft. "The judge shall dismiss a prosecution for obscenity or acquit a defendant notwithstanding a verdict of guilty, if the judge is satisfied that the material is not obscene.", that, notwithstanding the 1962 comment which refers to the 1958 *per curiam* reversals[41], it is impossible to point to the 1962 proposed draft as authority for the radical "review" exercised by the lower court. The 1962 comment reads, "What we *preserve* . . . in the present draft is the independent judgment of the court on the question of obscenity without impairing the defendant's right to a jury trial." Does this mean to preserve that which exists in case law, or that which appeared as a part of the former rejected provision? If the latter, what significance can be laid to the failure to include that portion which reads, "*or acquit a defendant, notwithstanding a verdict of guilty.*"

Two other jury trials involving Tropic of Cancer should be cited for this Court's consideration on the issue of review of jury determinations: *People v. Cuffel*, ...involving a criminal trial and a jury conviction for the sale of Tropic of Cancer in Indianapolis, Indiana and *Grove Press v. Florida*, 156 So. 2d 537 (September 17, 1963), involving a civil injunction in which a jury found Tropic of Cancer to be obscene. The former is currently on appeal to the Indiana State Supreme Court after the jury conviction. In the latter case, the jury's finding that Tropic of Cancer was obscene was upheld by the District Court of Appeal of Florida (*supra*). From the opinion in the latter case,

[41] We contend the comment is based on a misconstruction of the 1958 per curiam reversals. See Argument IV.

it appears as though Grove Press, in disclaiming any challenge to the invalidity of the Florida statute as applied to Tropic of Cancer[42], may have conceded the "finality" of a *jury* finding on Tropic of Cancer.

It is significant to note that of the seven state juries which have considered Tropic of Cancer (of which amici have any knowledge), not one jury has supported it. In criminal trials, *People v. Fritch* (New York), *Yudkin v. Maryland* (Maryland), *People v. Cuffel* (Indiana), and *People v. Smith* (California), the jury found the defendant guilty of knowingly selling an obscene book. In a civil suit, *Grove Press v. Florida* (Florida), the jury found the book to be obscene. The closest the book has come to winning honors was in *People v. Pershina* (Marin County, California), in which the book seller was acquitted (reportedly on failure to prove "scienter") and in which it is also reported that the jury stood 11 to 1 that Tropic of Cancer was obscene. In *People v. McGilvery* (San Diego, California), also a criminal trial, it is understood that the defendant was similarly acquitted because of failure to prove "scienter."

To permit the "review" exercised by the court below to stand, in the face of this "jury box score," is to sterilize the *Roth* test and render the "community standard" gauge a vapid shibboleth.

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[42] At p. 538.

"In assignments of error and in its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitutional. But prior to argument, appellant withdrew its claim of invalidity and unconstitutionality of the statute. . . ."

III.

"Tropic of Cancer," as a Matter of Law, Is Without the Area of Protected Speech and Press as That Line Is Drawn in Roth-Alberts.

While a court may not decide that written matter is obscene, as a matter of law, if "reasonable minds may differ that the matter is obscene," the opposite is true if it can be said that reasonable minds would *not* differ that the matter is obscene. In the latter case, the Court can and should declare the matter obscene, as a matter of law. *Rosen v. United States*, 161 U. S. 606, 610 (dictum); *Saccaringen v. United States*, 161 U. S. 765, 766 (reversed on other grounds), see also text accompanying note 30. "Tropic of Cancer" is in this area. This result is the opposite side of the coin to the Court's power to declare the matter not obscene as a matter of law where "the matter is so clearly innocent, the jury should not pass on it at all."

It is submitted that the test for obscenity designated by *Roth* and applied in *Besig*, is a "'balancing" test—the degree of literary merit versus the social interest in order and morality; that is, whether the subject matter is "of such slight social value as a *step to truth* that any *benefit* that may be derived . . . . is *clearly outweighed* by the *social interest in order and morality*".[43] (Our emphasis.)

The court below, (Opinion, Petition for Certiorari, p. 14, n. 19) implies that Judge Stephens did not apply the *Roth* test in the 1953 "Tropic of Cancer" case, *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953). A close reading does not support this, nor does the

[43] *Roth v. United States*, 1 L. Ed. 2d 1498, 1507.

opinion of the court below suggest wherein the alleged infirmity lies. There is no question but that the dominant theme[44], the average person and the contemporary community standards tests[45] were applied in the *Besig* case. The "prurient interest" of Tropic of Cancer is admirably considered.[46]

It is submitted that the difference in interpretations of *Besig*, entertained by the court below and by amici herein, stems not from the *Hicklin-Roth* conflict but rather from the answer to the question as to whether the court below or Judge Stephens' court properly applied the *Roth* test. We submit, as held by Judge Stephens, that an author may not "eloquently" produce a book with an obscene central theme so that it will gain constitutional protection[47]—that "literary merit"

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[44] At page 146.
"We agree that the book as a book must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. . . . If . . . dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene . . . we have adjudged each book as an integrated whole."

[45] At page 147, Judge Stephens quotes with approval Judge Learned Hand's famous statement of the average man in the community test. "We think Judge Learned Hand was in the best of his famous form in his happy use of words in U. S. v. Kinnerley." See note 12.

[46] At page 146.
"Applicant thinks our opinion is 'unclear as to whether the *test of obscenity is that it repeals or that it seduces*' . . . language can be so nasty as to repeal and of course to seduce as well. Appellant's argument tempts us to quote Pope's quatrain about the Monster Vice which, when too prevalent, is embraced. . . . 'Vice is a monster of so frightful mien As to be hated needed to be seen. Yet seen too oft, familiar with her face, We first endure, then pity, then embrace'. . . ." (Our emphasis.)

[47] At page 145.
"Nor do we understand that we have the legal power to hold that the statute authorizing the seizure of obscene

in the minds of a few, will not save work which is found by the community to be uncontestably beyond its acceptable standards.

If the interest of government in excluding "obscenity" is substantial (and it is assumed that the *Roth* case so instructs us), it is difficult to understand how such small significance can be accorded to the final judicial determination in *Besig* and to see it upset *as a matter of law*, and in disregard to the "climate" of the community as determined in the Bradley Reed Smith criminal trial.[48]

IV.

Freedom of Speech and the Press, as Guaranteed by the First and Fourteenth Amendment to the Constitution of the United States and as Construed in Roth v. United States and Alberts v. California (supra), and Other Decisions of This Court, Do Not Limit the Proscription of State Obscenity Laws to the Suppression of "Hard-Core" Pornography Only.

The *Roth* decision is clear that *obscene* material is not protected by the First Amendment. Nowhere is the word "hard-core" pornography referred to in the majority opinion.[49]

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books is inapplicable to books in which obscenity is an integral part of a literary work. So that obscenity, though a part of the composition of high literary merit, is not excepted from operation of the statute, whether written in the style of the realist, surrealist or plain shock writers."

[48]That there is error here as a matter of law is borne out by other jury verdicts. See text following note 42.

[49]Forgotten is the interpretation given Roth by the dissent of Justices Douglas and Black at page 1522. "It creates a regime wherein the battle between the literati and the Philistines, the Philistines are certain to win." The separate opinion of Justice Harlan referred to "hard-core" material, but only with

The concept that only "hard-core" material is prohibited, is a seduction espoused by the Kronhausens and certain commentators, with roots entangled in an erroneous interpretation of the 1958 *per curiam* "reversals"[30] of this court. Professors Lockhart and McClure write in 45 Minn. L. Rev. 35, "In three of the four cases, the Court must have made an *independent examination* of the materials and found that censorship of the materials violated constitutional requirements."

These three cases involved administrative prior restraint proceedings rather than criminal trials before the judiciary (*Roth-Alberts*) *Both* First Amendment *and Due Process issues* were involved, but the commentators saw no substantial issue other than the First Amendment issue (actual review of the subject matter involved). From this they deduced, at page 60, that this Court must have been thinking "abstractly" of "hard-core" pornography when it spoke of "obscenity" in Roth. They regarded the material as non-"hard-core", and the reversals on this ground.

Those decisions which have read the "hard-core pornography" concept into *Roth* have done so in reliance on this misguided interpretation. Notable here,

reference to the federal authority. If the Roth material was not "hard-core" as Justice Harlan so held, was not the affirmation of the Roth conviction a determination that "hard-core" was not the test, even in federal cases, where a jury was involved? (Roth was tried to a jury.)

[30]Certiorari was granted in four cases; *Times Film Corp. v. Chicago*, 355 U. S. 35 (movie, "The Game of Love"), One, *the Homosexual Magazine, Inc. v. Olesen*, 355 U. S. 371 (homosexual magazine), *Sunshine and Health and Sun Magazine v. Summerfield*, 355 U. S. 372 (nudist magazines), and *Mounce v. United States*, 355 U. S. 180 (nudist magazines, text in foreign language). The cases were summarily reversed without argument. See Supreme Court Practice, Stern and Gressman, sec. 5.12 at 180, 187 for factors to be considered in such cases.

is the opinion of Justice Desmond (concurred in by Justice Dye) in *People v. Richmond County News*, 175 N. E. 2d 681 (1961), a 4-3 decision involving the "girlie magazine." Chief Justice Desmond, influenced by the 1958 *per curiam* decisions, reluctantly held at page 688, "The inquiry for the court, therefore, is whether the publication is so entirely obscene as to amount to hard-core pornography . . . Virtuous adults will reject it (as all of us, Judges would *were we not restrained by the Roth-Alberts legal test*) . . .". (Our emphasis.) Had Justice Desmond not misconstrued the 1958 *per curiam* decisions, the dissenting opinion would have been the majority opinion (4-3 or 5-2) and the "hard-core" "myth" would never have gotten off the ground.

This infirmity in the source of the "hard-core concept" was recognized by the Court below in its opinion at footnote 23, where it says,

> "Each of these cases involves procedural problems which would justify the Court in refusing to consider the issue of obscenity.[21] The court's citation of Roth or Alberts, however, indicates that the reversals were on the obscenity issue. . . ". (Our emphasis.)

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[21] No administrative hearing was accorded in the *One* case. An administrative hearing was set in the *Sunshine and Health* case on the day the distributor filed his injunctive action in the Federal Court. In both cases, three years elapsed from the postmaster's refusal to deposit to the Supreme Court decision; nor did the federal government attempt to bring the matter before the federal courts in a criminal trial, where, in the words of Justice Warren, "It would be accorded all the protection of a criminal trial."

Presiding Judge Carrol in the trial court in *Penn v. Robin* and *Grove Press*, decided April 17, 1962,[52] rejects the analysis of these writers and the California Supreme Court and reaches a different result.

> "It must first be pointed out that in entering reversal in each of these cases the Court cited the Roth case in the Federal area and the Alberts case where state action was involved, and thus reaffirmed their reasoning in them. It is difficult to perceive how the Court's citation of the Roth-Alberts case can be construed as a dilution of their holding in that case. . . .
>
> It is to be noted that (in) each of these cases the initial order excluding the books from the mail was issued, *not after a finding by a court or a jury, but only upon the finding of the Postmaster General.* . . ." (Our emphasis)

Council for Amici made a similar observation about the same time, in a paper delivered to the League of California cities in San Diego on April 6, 1962, after *Marcus v. Kansas City Search Warrants*, 367 U. S. 717 (1961) was decided.[53] In that written opin-

[52]Judge Carrol's opinion appears at page 15 in Appendix A of People's (Respondent's) Brief filed in the District Court of Appeal and a part of the record in this case.

[53]At page 15.

> "Marcus v. Search Warrants' 6 L. Ed. 2, 1127 (decided June 19, 1961) suggests another explanation for the per curiam reversals. In my judgment, it is impossible to point to any of the four per curiam decisions as authority that the Supreme Court found the matter therein involved not to be obscene. Three of the four decisions dealt with administrative prior restraint and one dealt with judicial prior restraint. . . . None of the four dealt with a criminal prosecution. Although the 'scienter' issue of the criminal proceedings was thus removed, the more difficult 'prior restraint' issue more than compensated for its absence.

ion, involving a defective prior restraint operation, this Court reversed the judgment (but also refusing to decide whether the material was obscene) "in order to vindicate appellant's constitutional right." This and subsequent written decisions[34] in this Court reveal that "due process" is a *primary* consideration in the 1957-1963 cases.

Other cases indicate the *Lockhart* and *McClure* analysis is in error. Both writers regard the "girlie magazine" as not within the scope of "hard-core" material. Yet on October 23, 1961 in *Chobot v. Wisconsin*, 7 L. Ed. 2d 847, this Court refused to entertain an appeal from a court *criminal conviction* resulting from the sale of four girlie magazines of California manufacture. (Black, Douglas and Harlan noting probable jurisdiction.) Similarly on January 8, 1962, a petition for certiorari was denied in *Monfred v. Maryland*, 7 L. Ed. 2d 186, a *jury conviction* involving the sale of five girlie magazines of California manufacture. In both of these cases the issue was raised as to whether the material was entitled to constitutional protection.

It does not appear that the Manual Enterprises, Inc. case was reversed on the basis of subject matter, notwithstanding the grounds selected by Justice Harlan

As the finding of 'not guilty' in an obscenity prosecution cannot be allocated without poling the jury on the two separate issues of 'obscenity' and 'lewdly selling,' neither can the per curiam reversals be allocated without poling the United States Supreme Court on the two separate issues of 'obscenity' and 'prior restraint.' Neither Judge Carrol's opinion nor any similar comment was given wide circulation to conteract the bold statement of the commentators. This Court did not, however, continue the 1958 precedents (reversals without opinion)."

[34] *Manual Enterprises Inc. v. Day*, 370 U. S. 478 (1962), *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 (1963).

in his opinion (concurred in by Justice Stewart), for in *Womack v. United States*, 294 F. 2d. 204, certiorari denied 5 L. Ed. 2d 822, a *jury conviction* for mailing similar photographs, intended for purchase by homosexuals, was denied review in this Court. Womack was the president of Manual Enterprises Inc. See reference to this in the *Manual Enterprise Inc.* case, 8 L. Ed. 2d 639 at 651, 669.

An analysis of the obscenity cases in this Court during the past five years, and the separate opinions therein, give no indication that this Court has departed from the obscenity test stated in *Roth-Alberts*. What is shown, however, is that where the People engage in a "prior restraint" operation in preference to a criminal prosecution, they do so at their peril. This Court has refused to assume the role of the "Platonic Guardian" denounced by Judge Hand.

Conclusion.

Judge Stephen's reference to Pope's quatrain on the monster Vice in the *Besig* case bears repeating here.

"Vice is a monster of so frightful mien,
As to be hated needed to be seen,
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace."

The petition for certiorari should be granted.

Respectfully submitted.

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amici Curiae.